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BOOK REVIEWS

EDWARD GLUCK, *Editor-in-Charge*

THE LAW OF CONTRACTS. By SAMUEL WILLISTON, NEW YORK: BAKER, VOORHIS & Co. 1920. Vol. I., pp. xxiii, 1155.

It goes without saying that anything from Professor Williston's pen needs no commendation to the legal profession. A careful reading of the present volume will, however, convince the reader that if the later volumes fulfill the promise made by the one now before us, we shall have what will be, upon the whole, the best treatise upon the Anglo-American law of contracts.

The work is to be completed in four volumes. The present volume covers the general subject of the formation of contracts, including thereunder offer and acceptance, consideration, formal contracts, capacity of parties, contracts for the benefit of third persons, assignment of contracts, and the statute of frauds. It deals therefore with many of the most interesting of the problems which fall within the field of contract law, especially those involved in what is usually called "mutual assent" and the much-vexed question of consideration.

On the question of mutual assent the author abandons at the outset the subjective theory of contracts,—that there must be a so-called "meeting of the minds"—and adopts the objective theory which makes the existence of a contract depend upon a "proper expression of assent", whether there be assent in fact or not. He rejects also Savigny's view, "popularized for English and American lawyers by Sir Frederick Pollock and others, that not only mutual assent to a promise in fact, but an intent to form a legal relation is requisite for the formation of contracts".

In his reaction against the subjective test the learned author seems at one point to go too far, for he states that "even where one party makes it clear to the other that he is unwilling to enter into a contract, the law may nevertheless impose one upon him where his conduct would be tortious except upon the assumption that he assented to the offer" (p. 24). In a footnote, however, he expresses the view that the cases he has in mind "perhaps may be classed as quasi-contracts" since there is no "real expression of assent". That this latter view is the sound one seems to follow from Professor Williston's own definitions. "A contract", he says, "is a promise, or set of promises, to which the law attaches legal obligation" (p. 1) and "a promise from the very meaning of the word involves an undertaking to do something in the future" (p. 29). It seems very difficult to make "a promise", in his meaning of the word, out of an expression of dissent, a refusal to undertake or promise.

The author in his preface states that "some space" has been devoted to "legal analysis and criticism". It is believed that if a somewhat more searching analysis had been made many difficulties would have been avoided. On page 31 Professor Williston recognizes that an offer confers upon the offeree a legal "power" by complying with its terms "to turn the promise in the offer into a contract or sale", but fails to make adequate use of the concept in other parts of the work. For example, in dealing with an offer "to transfer title to personal property on receiving (or on the mailing) of a specified promise from the offeree" (p. 31) he is led,—because of this failure to keep in mind the

distinction between the offer as a factual thing and the resulting legal power conferred upon the offeree,—to treat the offer as “a promise when made”, which “becomes fully executed by the transfer of title at the time” the offeree makes the promise. If we assume that the offeree was already in possession of the personal property in question and that the offeror expressly refused to warrant the title, it seems obvious that such an offer is not a promise,—“an undertaking to do something in the future”,—but merely the grant to the offeree of a legal power to acquire the title to the property by communicating (or mailing, as the case may be) the specified promise.

An adequate analysis of fundamental legal conceptions would have enabled the learned author to avoid other statements which cannot stand the acid test of such a procedure. On page 14 we are told that “unless rescinded a voidable contract imposes on the parties *the same obligations* as if it were not voidable”. (The italics are the reviewers.) What does “obligations” mean? If it covers legal relations of all kinds,—rights, privileges, powers, immunities, etc.,¹ the statement in question is not true, for if “rescission” can be brought about by the defrauded person, this means that the latter has at least a legal “power” to alter the other “obligations” which are to be “rescinded”. Moreover, if the “contract” is purely executory, it would seem that no “rescission” by the defrauded person would be necessary. Assuming the “contract” to be one which if valid would contain mutual and concurrent conditions, can it be the law that the fraudulent person can, after making tender in due form, recover damages from the defrauded person if the latter, not having discovered the fraud, refuses to perform and when sued sets up as a defense the fraud subsequently discovered? It would seem not, and if not, it is clear that the “obligations” of the “voidable contract” before any “rescission” are in such a case really substantially different from those in an ordinary contract. The truth seems to be that we shall never make progress with such vague terms, or until we endeavor to find out just what legal relations,—rights, powers, etc., etc.,—a given transaction creates.

Noteworthy is Professor Williston’s unhesitating rejection of Professor Langdell’s theory that an offer *must* from its nature be revocable, and his corresponding recognition of “irrevocable offers”. Here again the matter would be clearer if it were pointed out that the thing which is “irrevocable” is the legal “power” resulting from the making of the offer. Similarly, the statement of the learned author (on p. 183) that “undoubtedly the offer and acceptance must exist at the same moment in order to form a contract”, is difficult to justify if by offer we mean the factual promise, for in the “irrevocable offer” cases the offeror may have withdrawn the promise before acceptance, and yet the offeree can still accept. What exists at the moment of the acceptance is the legal power (to bind the offeror by acceptance) which resulted from the making of the offer.

Equally worthy of note is the author’s acceptance of the rule that in contracts by correspondence the acceptance is complete on the mailing of the letter of acceptance,—a view which, as is well known, was severely criticized by Langdell. Professor Williston’s acceptance of the rule, which of course is the one, established by the decisions, is in accord with his adoption of the objective theory.

Unlike so many writers upon the subject of consideration Professor Williston refuses to allow the historical development of the action of

¹Hohfeld, *Fundamental Legal Conceptions* (1919) Yale University Press.

assumpsit out of a tort action for deceit to prevent him from dealing with the doctrine in a common sense way, so as to carry out the ideas and wishes of the business community. In recognizing that a benefit received by the promisor at his request ought to be, and according to a large number of the authorities actually is, a sufficient consideration in the case of a unilateral contract, he closes the discussion with the following: "On the whole, it seems better to take the wider rule. A promise made in return for a benefit to the promisor must have been seriously made, and it has been paid for at the price which the promisor requested and he has gained an advantage therefrom. This seems a sufficient reason for enforcing the promise, and the circumstance that the action of assumpsit was historically developed from an action of tort in which the gist of the action was an injury, or detriment to the promisee caused by reliance on the promise, seems an inadequate argument to the contrary. The law of contracts has travelled a long way from this beginning, and there seems no reason if the broader meaning makes for convenience at the present time why the natural meaning of the definition as laid down for centuries should be restricted for historical reasons" (p. 197).

Equally sensible is his rejection of the assumption that consideration must necessarily mean the same thing in bilateral and in unilateral contracts. He recognizes clearly the logical fallacy involved in Langdell's attempt to apply the "legal detriment" theory to mutual promises, and accordingly frames a separate definition for bilateral contracts as follows:—"Mutual promises in each of which the promisor undertakes some act or forbearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is rendered void by any rule of law other than that relating to consideration, are sufficient consideration for one another."

In discussing Professor Williston's definitions of consideration it must first be noted that he seems to confine "detriment" and "benefit" to the technical meaning of "legal detriment" and "legal benefit" respectively, as distinguished from actual detriment or benefit. Granted that a "legal" detriment or benefit—in the sense of the surrender of acquisition of a legal right, or a privilege, etc., etc.,—is sufficient consideration, does it follow that if an actual economic benefit is received at request there is no consideration? Conceivably a promisor might receive great economic benefit without acquiring any new rights or other legal relations; if such benefit in fact is conferred at his request, ought not the promise given in return to be held binding, at least in many cases? To put the matter in another way: if we admit that all the things included in Professor Williston's definitions are consideration, is it not possible that other things also ought to be included, and that no one single, comprehensive statement can be framed which will include them all? If business and commercial needs are to be satisfied, is it at all likely that any one simple formula will meet the demands of the situation?

The lack of an adequate analysis of fundamental conceptions has left its marks upon the discussion of consideration. Thus in stating the problem involved in the case of doing in return for a promise a thing when one is already under a duty to a third person to do the same thing, Professor Williston admits,—quite erroneously, it seems to the present reviewer,—that there is no legal detriment incurred by the promisee (p. 196). If we recognize, as upon adequate analysis we must, that any given legal relation always exists between two and only two human beings, we see that the promisee in such a case was before

doing the thing requested still privileged, as against the promisor (although not as against the third person) to refrain from doing the thing in question, and that when he did it he forebore the exercise of this privilege. Now forbearing to exercise a legal privilege is one of the most common forms of consideration in unilateral contracts. Moreover, even as against the third person the promisee had a legal power by repudiating the first contract to turn his primary duty to perform into a secondary duty to pay damages, and so, he gave up the exercise of this legal power also when he performed the desired act. Careful analysis shows therefore that "legal" detriment does exist in such cases, quite as much as elsewhere. It is believed that this will prove to be the case in very many of the cases which are usually supposed to fail to meet the requirements of the definition of consideration as a "legal" detriment.

The student of the law of contracts will need to supplement Professor Williston's work with the treatment of the same problems from the point of view of fundamental legal analysis found in Professor Corbin's notes to the new (third) American edition of *Anson on Contracts* (reviewed in the current volume of this Review, p. 629). If he does so, he will find that he has an equipment for dealing with the problems in the law of contracts much superior to that in almost any other field.

No indication is given in the present volume of Williston's work as to the distribution of topics in the remaining three volumes. We shall await with eagerness the appearance of these volumes, especially those containing the learned author's discussion of conditions, the parol evidence rule, and the relations of equity to law within the field of contracts.

W. W. C.

INHERITANCE TAXATION. By LAFAYETTE B. GLEASON and ALEXANDER OTIS. Second Edition. Albany: MATTHEW BENDER & COMPANY. 1919. pp. lxvii, 1138.

Only those who are willing to live in Alabama, Florida, South Carolina, Alaska or the District of Columbia can make bequests to collaterals and strangers without subjecting them to taxation on legacies over a certain amount. And they must be careful to die when their estate is all located in the jurisdiction of their domicile. Of the other states, only Iowa, Maryland and Texas spare the immediate family of the testator. And the United States takes toll of every estate over \$50,000. These interesting facts are given by Messrs. Gleason and Otis to show the practical need for their book. Since the first edition was published in 1917, twenty-five jurisdictions have materially amended their statutes. Of the states with inheritance taxes, only ten refrain from levying on transfers of stock in domestic corporations held by non-resident decedents. With nearly every jurisdiction taxing the other property of non-resident decedents which lies within their borders, every lawyer needs all the help he can get as to the varying provisions of substance and of procedure obtaining throughout the country.

In this volume the authors have gathered together the essential provisions of statutes and have digested and arranged the judicial decisions on questions of construction and of constitutionality. Especial attention is paid to the law of New York. The work is planned for the man who is content with what is so because legislatures and courts have said that it is so, rather than for those who are curious